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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

NUMBER 557

A. C. PARK,
Petitioner

vs.

THE STATE OF GEORGIA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

A. C. Park petitions this Court for a writ of certiorari to review the judgment and opinion of the Supreme Court of Georgia entered in the case of *A. C. Park v. The State of Georgia* on the 2nd day of July, 1968.

OPINIONS BELOW

The opinion and judgment of the Supreme Court of Georgia are as yet unreported but are appended hereto, (Appendix) and unofficially reported in 162 S.E.2d 359, (advance sheet of Sept. 12, 1968.)

JURISDICTION

The judgment of the Supreme Court of Georgia was

dated and entered on July 2, 1968. A rehearing in said judgment was denied by the Supreme Court of Georgia on July 16, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3) since a right, privilege and immunity is specially claimed under the Constitution of the United States.

QUESTION PRESENTED FOR REVIEW

The question presented is whether the admission of testimony by state witnesses as to extrajudicial hearsay declarations made out of court by alleged conspirators and other persons not on trial and made out of the presence of, and tending to inculpate, the accused violates the accused's constitutional right to be confronted by the witnesses against him as guaranteed by the Sixth Amendment to the United States Constitution and whether the consideration of such hearsay declarations as original evidence by a State court deprives accused of due process of law as guaranteed by the Fourteenth Amendment thereto.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment Six of the Constitution of the United States provides:

> "In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him."

Amendment Fourteen of the Constitution of the United States provides:

> "nor shall any State deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF CASE

Petitioner, A. C. Park, was indicted, along with Douglas Pinion, J. H. Blackwell, Lloyd George Seay and George Iras Worley, by the Grand Jury of Jackson County, Georgia for the murder of Floyd Hoard by the use of dynamite and other explosive substances.

Floyd G. Hoard was the duly qualified and elected Solicitor General of the Piedmont Judicial Circuit and resided near Jefferson in Jackson County. During the early morning hours between 7 and 7:30 A.M. on August 7, 1967, Mr. Hoard left his home and as he got into his 1967 Ford to start the ignition the vehicle exploded as a result of dynamite that had been wired to the ignition system of the car, thereby causing his death within a few minutes thereafter.

After an investigation of about 4 months, the Jackson County Grand Jury indicted A. C. Park, the petitioner, and the other four persons as stated. Four of them, including petitioner, were in custody at the time of petitioner's trial in January, 1968, having been held incommunicado from each other since their arrest.

On the separate trial of A. C. Park it was shown by the State that defendant Lloyd Seay, J. H. Blackwell and George Worley together purchased the dynamite and wired it to the car. Worley did not testify, but Blackwell and Seay both testified as witnesses for the State. No direct evidence was offered against petitioner and Blackwell never mentioned petitioner's name.

Seay had no personal or direct dealings with petitioner, but was permitted to testify over objection that Pinion had paid him $5,500.00 to kill Hoard, and that

on one occasion Pinion stated to the witness that "the old man wouldn't go up any more." Seay then testified over further objection that he understood Pinion meant A. C. Park when he referred to "the old man." Seay was also permitted to testify over further objection that Worley had on one occasion told him "the old man" would have something done to him or his family if he didn't go through with the killing.

Almost all the other evidence for the State concerned activities involving the sale of liquor and beer by the petitioner and the efforts of Hoard to prosecute him for it.

No other evidence tending to connect petitioner with the murder, or with any conspiracy to murder, was introduced. Petitioner moved to exclude each and every one of these hearsay declarations at the conclusion of the testimony for the State, but was overruled each and every time. A motion for directed verdict was made by petitioner and overruled by the court.

Petitioner was found guilty by a jury and sentenced to be electrocuted. An appeal was taken to the Georgia Supreme Court setting out 20 enumerations of error. The first and second enumerations of error concerned themselves with the sufficiency of the evidence to support the verdict, the next seventeen enumerated errors complained of the trial court's rulings permitting hearsay evidence and conclusions based on hearsay to be allowed in evidence to support the verdict, and the last enumerated error involved the refusal of the trial court to grant defense counsel the opening and concluding argument to the jury.

The Supreme Court of Georgia sustained the last

enumeration of error, thereby reversing the judgment of the trial court with direction to grant a new trial because of the failure of the trial court to allow defense counsel the opening and concluding argument to the jury, but held all the hearsay evidence to be admissible and sufficient to authorize a guilty verdict, and thus overruled the first nineteen enumerations of error, the first of which would have authorized an absolute reversal of the conviction, if it had been sustained, and if the hearsay had been eliminated.

A motion for rehearing was made by petitioner on six grounds, five of them being non-federal and one of which concerns this petition for certiorari, to-wit: the federal ground that petitioner was denied the right to be confronted by the witnesses against him and was denied the right of cross-examination, in violation of the Sixth Amendment to the United States Constitution.

The Georgia Supreme Court denied the motion for rehearing without opinion.

MANNER OF RAISING FEDERAL QUESTION

In ground #3 of the motion for rehearing before the Georgia Supreme Court (R. 784,) petitioner pointed out to that Court that their ruling, holding State witness Seay's testimony as to the declarations made to him by Pinion that "the old man won't go up any more" and other hearsay declarations inculpating petitioner, to be admissible were contrary to the holding by this Court in *Bruton v. U. S.*, No. 705, October Term, 1967, decided May 20, 1968. (88 S.Ct. 1620)

Enumerations of error #3 through #19, filed in the Georgia Supreme Court at the time of filing the briefs

therein, (R. 734, 738,) in accordance with the practice of that Court, complain of the admission into evidence of various hearsay testimony of a similar nature and conclusions of the witness attempting to interpret the meaning of such hearsay declarations.

All of the hearsay declarations were objected to in the trial court when they were offered and motions to exclude were made at the close of the evidence for the State. (R. 660-676.)

SUMMARY OF REASONS FOR ALLOWANCE OF WRIT

1.

The decision of the Georgia Supreme Court is contrary to the decisions of this Court in

BRUTON V. UNITED STATES

_____ U. S. _____ (88 S.Ct. 1620), and

ROBERTS V. RUSSELL

_____ U. S. _____ (88 S.Ct. 1921.)

2.

Under Georgia law, the decision will become the law of the case and binding on the trial court and appellate courts in a future trial, even though wrong.

3.

The question involved is of gravity and importance in the administration of the criminal laws in all State and federal trials as regards the right of a defendant to be confronted with the witnesses against him in a criminal case.

ARGUMENT OF REASONS FOR ALLOWANCE OF WRIT

1.

DECISION CONTRARY TO BRUTON v. U. S.

This Court is not being called upon to decide the sufficiency of the evidence to support the verdict. This is a matter that we concede must be left to the State Courts to decide. However, the Supreme Court of Georgia, in reaching a determination that the evidence "as a whole" was sufficient to support the verdict, considered the unconstitutional testimony of the co-defendant, Seay, as to a conversation had with co-defendant Pinion relating extrajudicial statements of opinions by Pinion and Worley inculpating the accused, and such evidence should have been eliminated in the consideration of the sufficiency of the evidence, by the Georgia Supreme Court.

Petitioner is entitled to be confronted with the witnesses against him, including the right to cross examine them.

BRUTON V. UNITED STATES
_____ U. S. _____ (86 S.Ct. 1620).

ROBERTS V. RUSSELL
_____ U. S. _____ (86 S.Ct. 1921.)

In this case petitioner was found guilty of a serious murder charge by a rural jury in a small community of North Georgia. The victim was a high public official, the Solicitor General of that Circuit and an elected official under Georgia law.

Petitioner was 76 years of age and was placed on trial

less than 30 days after the indictment was returned. On the same day that the verdict was returned petitioner was sentenced by the Court to death by electrocution. An appeal was taken to the Georgia Supreme Court. After summarizing the evidence that Court found that "this defendant did not commit the act itself and was not actually present at the scene when others committed it." (R. 752)

The only really damaging evidence in the record which tends to connect the petitioner with a conspiracy to commit the murder is that given by co-defendant Seay, wherein he was permitted to testify that Pinion, another co-defendant *who was available to the State as a witness* but was not used, told him that "the old man wouldn't go up any more," and that after the killing Pinion told him "the old man was worried," and that Worley, another co-defendant who did not testify, stated to Seay that if he didn't go through with the murder "the old man" would have something done to him or his family.

The Georgia Supreme Court held all of these declarations to be admissible, and sufficient with the other evidence in the case to take away the life of the accused.

The decision of the Georgia Supreme Court in this case is contrary to *Bruton v. U. S.*, supra, where it was held:

> "Plainly, the introduction of Evans' (co-defendant) confession added substantial, perhaps even critical, weight to the Government's case in a form not subject to cross examination, since Evans did not take the stand. Petitioner thus was denied his constitutional right of confrontation."

This case presents to this Court an even more flagrant violation of the Confrontation Clause than in *Bruton,* because there the trial judge instructed the jury to disregard the extrajudicial confession of the co-defendant insofar as it inculpated the non-confessor, whereas here the extrajudicial declaration of the co-defendant was admitted into evidence *against* the defendant on trial, to be considered by the jury *as evidence against* the defendant on trial, and accepted as proof of its truthfulness by the Supreme Court of Georgia in passing upon the sufficiency of *the evidence as a whole* to support a verdict which would authorize the death penalty under Georgia law.

This case is also contrary to

ROBERTS V. RUSSELL

---------- U. S. ---------- (88 S.Ct. 1921,)

where this Court held:

> "Although *Bruton* involved a federal prosecution and this is a State prosecution, the right of cross-examination secured by the Confrontation Clause of the Sixth Amendment is made applicable to the States by the Fourteenth Amendment."

This decision also held that *Bruton* "is to be applied retroactively."

The decision of the Georgia Supreme Court is also contrary to

BROOKHART V. JANIS

384 U. S. 1 (86 S.Ct. 1245,) where

this Court remanded a habeas corpus to the Supreme Court of Ohio because the State court permitted the prosecution to introduce in evidence against him an

out-of-court alleged confession of a co-defendant and denied him the right of cross-examination.

The decision of the Supreme Court of Georgia is contrary to

BARBER V. PAGE, WARDEN
..... U. S. ..... (88 S.Ct. 1318) where

this Court, in a unanimous decision, reversed a State conviction on the basis of the Confrontation Clause because the principal evidence against the accused consisted of the reading of a transcript of the testimony of a witness given at a preliminary hearing and the State had not attempted to seek the witness' presence.

The facts of this last case are analogous to the case at bar because here the State had Pinion, the co-defendant, in custody. Yet the State chose to use Seay to testify as to the out-of-court declaration of Pinion tending to inculpate the petitioner. Had Pinion testified as a witness, he would have been subject to cross-examination by counsel for petitioner. As matters stood, however, his right of cross-examination was lost.

Petitioner should have had the right to cross-examine Pinion as to this declaration so that the jury might know if the declaration had any basis in fact, or whether it was false.

The Georgia Supreme Court's decision in this case is contrary to that of

DOUGLAS V. ALABAMA,
380 U. S. 415 (85 S.Ct. 1074,)

wherein two defendants were tried separately for armed robbery. Douglas' co-defendant was tried first and con-

victed. When Douglas was tried the State called the co-defendant as a witness, and attempted to prove a confession by him inculpating Douglas. The witness refused to answer and the State's Attorney was permitted to read the statement to him. The State then put police officers on the stand to prove the statement was made. This Court ruled:

> "Loyd (the co-defendant) could not be cross-examined on a statement imputed to but not admitted by him. Nor was the opportunity to cross-examine the law enforcement officers adequate to redress this denial of the essential right secured by the Confrontation Clause. Indeed, their testimony enhanced the danger that the jury would treat the Solicitor's questioning of Loyd and Loyd's refusal to answer as proving the truth of Loyd's alleged confession. But since their evidence tended to show only that Loyd made the confession, cross-examination of them as to its genuineness could not substitute for cross-examination of Loyd to test the truth of the statement itself."

The case at bar is similar. Seay testified about conversations with Pinion and Worley. The content of those conversations inculpated the petitioner. Seay's testimony tended to show only that Pinion and Worley made the declarations, not that they were true. Therefore cross-examination of Seay as to the genuineness of the declarations could not substitute for cross-examination of Pinion and Worley to test the truth of the statements themselves.

This is an extremely important question in the administration of the criminal law in this country. Far too many instances of this flagrant abuse of the denial of confrontation are being used by overzealous prosecutors

more bent on securing convictions than maintaining justice. Exceptions to the hearsay rule may have been born out of necessity or convenience to attest to some collateral or harmless issue, but to make out of it a Frankenstein monster by permitting the prosecution to dispense with the witness having knowledge of the facts by substituting one who is shielded from cross-examination as to the truth is to make a mockery of the Sixth Amendment.

2.

DECISION WILL BE LAW OF THE CASE

Although the judgment of the Georgia Supreme Court is one of reversal, it is not an absolute reversal but one with direction to grant a new trial. The petitioner sought an *absolute reversal* by his first enumeration of error complaining of the trial court's failure to direct a verdict of not guilty.

Under Georgia law an enumeration of error assigning error on the failure of the trial judge to grant a motion to direct a verdict of not guilty in a criminal case brings the sufficiency of the evidence under review.

SUTTON V. STATE

223 Ga. 313 (154 S.E.2d, 578.)

Furthermore, under Georgia law, the law of the case rule prevails.

BRYANT V. STATE

197 Ga. 641 (30 S.E.2d, 259,)

holds as follows:

> "Where a former decision has been rendered by this court in the same criminal case, on its subsequent

appearance this doctrine has been applied where the evidence shows substantially the same facts."

Under the ruling of the Georgia Supreme Court in this case the decision not to sustain the enumerations of error regarding the sufficiency of the evidence or the admission of the hearsay declarations will be the law of the case and binding both on the trial court on a new trial and the appellate court in the event of another appeal. The decision of the Supreme Court will be on a non-federal basis and this court will be without jurisdiction to review it.

DURLEY V. MAYO

351 U. S. 277 (76 S.Ct. 806.)

CONCLUSION

The Georgia Supreme Court's decision and judgment in not granting an absolute reversal and in not holding the hearsay testimony of Seay regarding the declarations by Pinion and Worley to be constitutionally inadmissible should either be reversed, or the opinion of the Georgia Supreme Court should be vacated for such further opinion and decision in the light of *Bruton v. U. S.*, supra.

This conclusion is reached because the Georgia Court, in determining the sufficiency of the evidence to support the verdict, based its decision on the *"evidence as a whole,"* thus failing to eliminate from the Court's consideration that evidence which was admitted by the trial court in violation of the Confrontation Clause.

We have no way of knowing what the Georgia Supreme Court will determine as to the sufficiency of the evidence if the hearsay is ordered eliminated, but peti-

tioner is entitled to a determination free from the taint of illegally admitted evidence which has been introduced in violation of the Confrontation Clause of the Constitution.

The judgment of the Georgia Supreme Court should be vacated and the case remanded to that Court for further proceedings so that they may reevaluate the evidence, by eliminating any consideration of the constitutionally inadmissible hearsay declarations.

Respectfully submitted,

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